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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 356

JUAN RIGORES SARDINO, PETITIONER

v.

THE FEDERAL RESERVE BANK OF NEW YORK AND THE SECRETARY OF THE TREASURY OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit (Pet. 16–32) is reported at 361 F. 2d 106. The opinion of the district court (App. 15a–24a) [1] is not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 22, 1966 (Pet. 16). The petition for a writ of certiorari was filed on July 16, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] The reference "App." is to the record appendix to petitioner's brief in the court of appeals.

QUESTIONS PRESENTED

1. Whether the Cuban Assets Control Regulations of July 8, 1963, are authorized by the Trading with the Enemy Act.

2. Whether the Cuban Assets Control Regulations and the Trading with the Enemy Act, as applied to "freeze" funds held in the New York bank account of a resident and national of Cuba are constitutional.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Trading with the Enemy Act, as amended (55 Stat. 839, 50 U.S.C. App. 1 *et seq.*) and the Cuban Assets Control Regulations (31 C.F.R., Part 515) are set out in the petition at pages 33–34, 36–39.

STATEMENT

Petitioner, a national of Cuba and a resident of Havana, maintains a savings account in a New York bank (App. 3a–4a). In July 1963 all property in the United States belonging to the Cuban government and to Cuban nationals was "frozen" pursuant to the Cuban Assets Control Regulations. In March 1964 petitioner filed with the Foreign Assets Control Division of the Federal Reserve Bank of New York an application for a license to withdraw his funds from the United States (App. 6a–8a). The application was referred to the Office of Foreign Assets Control, Department of the Treasury, where it was denied on the ground that "[t]ransactions of this type are not consistent with the present policy of this Government

with respect to Cuba" (App. 8a–9a). A request for reconsideration was also denied (App. 9a–11a).

Petitioner then commenced this action in the United States District Court for the Southern District of New York (App. 3a–5a), in which he challenged the Treasury Department's action in denying his application for a license, the Cuban Assets Control Regulations, and the statutory basis therefor. The complaint sought judgment (1) directing the Federal Reserve Bank of New York and the Secretary of the Treasury to grant a license for withdrawal of the funds or (2) declaring that no license was required to permit withdrawal or (3) declaring that Section 5 of the Trading with the Enemy Act, 50 U.S.C. App. 5, and the Cuban Assets Control Regulations are unconstitutional (App. 5a).

Respondents moved to dismiss the complaint on the ground that it failed to state a claim upon which relief could be granted (App. 13a–14a). The district court rejected petitioner's attack upon the validity of the government's action in freezing Cuban assets (App. 15a–24a) and dismissed the complaint (App. 25a). The court of appeals affirmed (Pet. 16–32).

ARGUMENT

The decisions below dismissing the complaint are clearly correct. The petition does not present any conflict or other consideration warranting further review by this Court. Petitioner's principal contentions are (1) that the Cuban Assets Control Regulations are not authorized by Section 5(b) of the Trading with the Enemy Act, (2) that Section 5(b) of the

Act involves an unconstitutional delegation of legislative power, and (3) that the Act and the regulations, as applied to him, entail a deprivation of property in violation of the Fifth Amendment. As we show below, none of these contentions is meritorious.

1. Contrary to petitioner's position, the Cuban Assets Control Regulations are fully authorized by the provisions of Section 5(b) of the Trading with the Enemy Act. That Section 5(b) is not solely a war measure in the sense that we must formally be at war with Cuba to warrant a "freeze" of assets in this country belonging to Cuba or her nationals is clear from the language of the Act, as well as from the congressional and judicial validation of its application in the freezing of foreign property prior to this country's entry into World War II.[2]

As initially enacted, Section 5(b) of the Trading with the Enemy Act[3] authorized the President to regulate foreign exchange transactions, the export of gold or silver coin or currency, and transfers of credit or evidences of indebtedness or property "between the United States and any foreign country, whether enemy, ally of enemy or otherwise, or between residents of one or more foreign countries." By Joint Resolution of May 7, 1940, 54 Stat. 179, Congress amended the Section to grant to the President broad regulatory power over property "in which any foreign state or a national or political subdivision thereof, as de-

[2] For a discussion of foreign property controls see Goodman, *United States Government Foreign Property Controls*, 52 Geo. L. J. 767 (1964).

[3] Act of October 6, 1917, 40 Stat. 411, 415.

fined by the President, has any interest * * *." Further, the Joint Resolution specifically reiterated that the powers conferred on the President could be exercised by him "[d]uring time of war or *during any other period of national emergency declared by the President*" (emphasis added).[4]

Under that amendment, prior to our entry into World War II, the government carried on an extensive and restrictive regulation of foreign-owned property, culminating in the freezing of assets of nationals of countries in all of continental Europe, China and Japan. E. O. No. 8389, 5 Fed. Reg. 1400 (April 10, 1940);[5] E. O. No. 8785, 6 Fed. Reg. 2897 (June 14, 1941); E. O. No. 8832, 6 Fed. Reg. 3715 (July 26, 1941). In Executive Order No. 8785, which extended to all of Europe the freezing controls that Executive Order No. 8389 had applied with respect to Norway and Denmark, the President declared the "existence of a period of unlimited national emergency." These orders were designed "to prevent the use of financial facilities of the United States in ways harmful to national defense and other American interests, to prevent the liquidation in the United States of assets looted

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[4] Section 5(b) of the Trading with the Enemy Act was earlier amended during the banking emergency of 1933 to make clear that the President could exercise regulatory power over banking institutions not only in time of war but also "[d]uring any other period of national emergency declared by the President * * *." Act of March 9, 1933, Section 2, 48 Stat. 1.

[5] In the Joint Resolution of May 7, 1940, *supra*, Congress, in addition to enlarging the regulatory powers conferred upon the President in Section 5(b), also ratified the action of the President in this Executive Order.

by duress or conquest, and to curb subversive activities in the United States." U.S. Treasury Department, *Documents Pertaining to Foreign Funds Control* 64 (1946). And in *Propper* v. *Clark*, 337 U.S. 472, 486, the Court said that the Joint Resolution of May 7, 1940, and the Executive Order of April 10, 1940, "put into effect a valid plan for control of the property covered by the regulation," which prevented a transfer of title to certain frozen Austrian property without a license.

Upon the entry of the United States into the war, Congress, in Section 301 of the First War Powers Act, 1941, 55 Stat. 839, further amended Section 5(b) of the Trading with the Enemy Act to read in pertinent part as it does today. It again confirmed the President's regulatory power, during time of war "or during any other period of national emergency declared by the President," over "any property in which any foreign country or a national thereof has any interest * * *."

The condition precedent to the exercise of the powers conferred by Section 5(b)—*i.e.*, a "national emergency declared by the President"—has clearly been met.[6] On December 16, 1950, the President declared (Proclamation No. 2914, 64 Stat. A454) "the existence of a national emergency" based upon the "increasing menace of the forces of communist aggression" (Pet. 39–41). And the continuing existence of such "national emergency" was declared in

[6] Petitioner's suggestion (Pet. 10–11) that the "national emergency" language in Section 5(b) has reference solely to a domestic economic crisis such as the banking emergency in 1933, is wholly without merit. See *Pike* v. *United States*, 340 F. 2d 487 (C.A. 9).

1960 (E.O. No. 10896, 25 Fed. Reg. 12281), in 1961 (E.O. No. 10905, 26 Fed. Reg. 321), and 1962 (E.O. No. 11037, 27 Fed. Reg. 6967). In light of the notoriously strained relations between the United States and Cuba, evidenced by the severance of diplomatic relations in January 1961 and the international crisis precipitated by the discovery of Soviet missile installations in Cuba in October 1962, it can hardly be said that the declared emergency and its relevance to relations with Cuba are merely technical or in any sense fictional. Petitioner's assertion (Pet. 12) that there is no "actual national emergency in effect today with respect to the Republic of Cuba" is wholly unpersuasive. Indeed, the court of appeals observed (Pet. 24) that "only in a technical sense are we at peace" with Cuba.

The Cuban Assets Control Regulations, 31 C.F.R., Part 515, here in issue, were promulgated by the Secretary of the Treasury on July 8, 1963.[7] The regulations reflected the continuation of a policy which had previously led the Secretary of State to terminate diplomatic and consular relations with Cuba and to impose restrictions on travel to Cuba (26 Fed. Reg. 492). Furthermore, in the Foreign Assistance Act

[7] Petitioner's contention (Pet. 14) that the President could not validly delegate his power under Section 5(b) is patently without merit. Section 5(b)(1) authorizes the President to act "through any agency that he may designate." Moreover, as the court below noted (Pet. 21–22), the Constitution presents no bar to such delegation in the field of foreign affairs or in any other. See *Marbury* v. *Madison*, 1 Cranch 137, 166.

of 1961,[8] Congress provided that no assistance be furnished under that Act to the present government of Cuba, and authorized the President to establish and maintain a total embargo upon all trade between the United States and Cuba. In February 1962 such an embargo was proclaimed.[9] In 1962[10] and in 1963[11] Congress enacted restrictions on assistance to countries which assisted the government of Cuba. And on October 3, 1962, Congress passed a Joint Resolution,[12] stating the determination of the United States

> * * * to prevent by whatever means may be necessary, including the use of arms, the Marxist-Leninist regime in Cuba from extending, by force or the threat of force, its aggressive or subversive activities to any part of this hemisphere * * *.

Given the state of affairs as perceived by both the Executive and Legislative branches of the government, there is simply no basis for petitioner's contention that the regulations in question exceed the authority delegated by Section 5(b) of the Trading with the Enemy Act.

2. Equally without merit is petitioner's contention that Section 5(b) of the Act is an unconstitutional

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[8] Sec. 620(a), 75 Stat. 444, 22 U.S.C. 2370(a).

[9] Presidential Proclamation No. 3447, 27 Fed. Reg. 1085 (February 6, 1962). The Cuban Import Regulations issued in connection with that embargo, 27 Fed. Reg. 1116, as amended 27 Fed. Reg. 2765, were subsequently revoked by the Cuban Assets Control Regulations.

[10] Act of August 1, 1962, 76 Stat. 260.

[11] Act of December 16, 1963, 77 Stat. 386.

[12] 76 Stat. 697.

delegation of legislative power in that it does not set forth standards for the exercise of the powers granted. Section 5(b) expressly states the powers conferred (prevention and prohibition of transfers and withdrawals), the subject matter (property of any foreign country or a national thereof), and the limit on the occasion of the exercise of such powers ("time of war or during any other period of national emergency"). Moreover, as this Court pointed out in *United States* v. *Curtiss-Wright Corp.*, 299 U.S. 304, 320, legislation "within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved."

In *Zemel* v. *Rusk*, 381 U.S. 1, in rejecting an identical argument with respect to restrictions imposed by the Executive on travel to Cuba, under the Passport Act of 1926 (22 U.S.C. 211a), this Court said (381 U.S. at 17):

> It is important to bear in mind, in appraising this argument, that because of the changeable and explosive nature of contemporary international relations, and the fact that the Executive is immediately privy to information which cannot be swiftly presented to, evaluated by, and acted upon by the legislature, Congress—in giving the Executive authority over matters of foreign affairs—must of necessity paint with a brush broader than it customarily wields in domestic areas.

See, also, *United States* v. *Von Clemm,* 136 F. 2d 968, 970–971 (C.A. 2), certiorari denied, 320 U.S. 769.

3. Petitioner also claims that the statute and regulations, as here applied, violate his constitutional rights under the Fifth Amendment. Under the regulations, petitioner has been prevented from withdrawing dollars from the United States. Were he to withdraw those dollars, he would be required by Cuban law (Pet. 25, n. 6) to surrender them for pesos at the National Bank of Cuba. It is that diversion of dollars into the hands of a regime, deemed by the Executive and Congress to be at present hostile to the United States, that the regulations seek to preclude. They do no more than is necessary to achieve that end. Petitioner's bank account in New York has not been seized by or vested in the United States. Compare *Silesian-American Corp.* v. *Clark,* 332 U.S. 469. It has been frozen in the United States. Petitioner may, without license, have the fund invested in securities (31 CFR § 515.513); he may use it to pay customs duties or taxes owed in the United States (31 CFR § 515.510); if he seeks refuge here, the funds will be available to him (49 Dept. of State Bull. 160 (1963)). When and if the present disagreements between the United States and Cuba are resolved or mitigated the frozen fund will in all likelihood be released.

While it may well be that the curtailment or deferral of his use of the fund is a burden to petitioner, this Court has long recognized that "[f]rustration and

appropriation are essentially different things." *Omnia Commercial Co.* v. *United States,* 261 U.S. 502, 513. Many restrictive regulations effectively deprive owners of the use of their property without constituting an impermissable taking. "A new tariff, an embargo, a draft, or a war may inevitably bring upon individuals great losses; may, indeed, render valuable property almost valueless" without falling within the proscription of the Fifth Amendment. *Knox* v. *Lee,* 12 Wall. 457, 551. Here, as in *United States* v. *Central Eureka Mining Co.,* 357 U.S. 155, 166, the government has not taken possession of the property in issue but only curtailed its use. While the Court has recognized that in time of emergency property may be destroyed altogether without compensation (*United States* v. *Caltex* (*Philippines*), *Inc.,* 344 U.S. 149; *Bowditch* v. *Boston,* 101 U.S. 16), here the freezing of petitioner's bank account merely serves to preserve the *status quo* pending the resolution of the present disagreements between the United States and Cuba—including the disposition of American claims for property expropriated by the Cuban government. Cf. *Banco Nacional de Cuba* v. *Sabbatino,* 376 U.S. 398, 412.

The imposition, in peace time as well as war, of freezing regulations under Section 5(b) of the Trading with the Enemy Act has been considered and sustained by this Court in the past. See *Propper* v. *Clark,* 337 U.S. 472; *Zittman* v. *McGrath,* 341 U.S. 446. Moreover, the validity of the economic measures imposed by foreign assets control regulations both

prior to and after World War II has been upheld in criminal prosecutions for violations of those regulations. See *United States* v. *Qoung,* 303 F. 2d 499, (C.A. 6), certiorari denied, 371 U.S. 863; *United States* v. *China Daily News,* 224 F. 2d 670 (C.A. 2), certiorari denied, 350 U.S. 885; *United States* v. *Von Clemm, supra; United States* v. *Broverman,* 180 F. Supp. 631 (S.D.N.Y.). In the circumstances, there is no compelling reason for further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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